BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSEPH BARBURY	)	
Claimant	)	
	)	
VS.	)	
	)	
DUCKWALL ALCO STORES, INC.	)	
Respondent	)	Docket No. 1,012,703
	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Both parties requested review of the February 7, 2008 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on May 21, 2008.

APPEARANCES

Gary Peterson, of Topeka, Kansas, appeared for the claimant. Andrew D. Wimmer, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties agreed that claimant's last date worked for respondent was March 29, 2005. The parties also agreed that the final paragraph in the Award contains an incorrect rate for payment of claimant's temporary total disability (TTD) benefits. Thus, the correct payment rate, $318.20, will be utilized and the calculations will be corrected herein.

ISSUES

Claimant sustained a bilateral knee injury as a result of his work-related injury on April 15, 2002. The ALJ awarded claimant a 40 percent permanent partial general (work)

disability under K.S.A. 44-510e(a) rather than two separate scheduled injuries as required by *Casco*.[1] Both parties have appealed this Award.

The claimant appealed the Award suggesting that he is permanently and totally disabled as a result of his accident. Alternatively, if he is not found to be permanently and totally disabled, claimant believes he is entitled to a 62.5 percent work disability based upon a 71 percent task loss and a 54 percent wage loss. Finally, if compensation for two scheduled injuries is awarded, the claimant argues that the greater weight of evidence suggests that he has sustained a 50 percent permanent partial impairment to each of his lower extremities. In addition, claimant maintains that the statutory calculation for two separate scheduled injuries does not allow for any deduction of previously paid temporary total disability (TTD) benefits.

Claimant also challenges the constitutionality of *Casco* as well as the Board's earlier holdings where previously paid TTD was deducted from the weeks to be paid on a scheduled injury. However, claimant recognizes the Board's lack of jurisdiction on these constitutionality issues and merely preserves them for further appeal.

Respondent has also appealed the Award asking the Board to modify the ALJ's Award consistent with the principles announced in *Casco,* thus limiting claimant's recovery to two separately scheduled injuries to the lower extremities. Respondent further contends that claimant is not permanently and totally disabled as he continues to work, performing substantial gainful employment. Respondent also asks the Board to modify the calculation of those benefits to account for TTD benefits already paid to claimant and split the TTD equally between the 2 scheduled injuries.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant sustained a bilateral knee injury on April 15, 2002.[2] He had bilateral knee replacements and as of March 29, 2005 he was no longer working for respondent. Claimant continues to have difficulty with his knees and experiences daily problems with pain and swelling. Claimant has had various jobs since leaving respondent's employ and

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[1] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

[2] Claimant's initial injury was to his right knee. While receiving treatment for that injury, including a total knee replacement, claimant began to have problems with his left knee. There is no apparent dispute that the left knee injury, which ultimately required a knee replacement as well, was a natural and probable result of the April 15, 2002 right knee injury. Thus, the parties' agreed that April 15, 2002 was the legal date of accident.

presently works 31.5 hours per week earning $7.00 per hour as a security guard. This job allows him to shift his positions taking into account his lower extremity symptoms. No physician has suggested that claimant should work less than 40 hours per week. And there is some suggestion in the file that claimant maintains this reduced number of hours in order to maintain his disability benefits from Social Security.[3] His present wages in this job represent a 54 percent wage loss when compared to his pre-injury job with respondent.

The primary issue present in this case is the nature and extent of claimant's impairment. The ALJ awarded benefits based upon a permanent partial general (work) disability as set forth in K.S.A. 44-510e(a). In doing so, the ALJ offered the following analysis:

> The court is mindful that,"[s]cheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d." [citation omitted] "K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries."[4]
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> . . . .
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> This court is mindful of K.A.R. 51-7-8(c)(4), which specifies, "An injury at the *joint on a scheduled* (emphasis added) shall be considered a loss to the next higher schedule." Like the hip, the knee joint is clearly not "on a scheduled member" but rather a separate and distinct portion of the lower extremity. There is no "next higher schedule" since there must be a "lower schedule" to which the knee is ostensibly is [sic] attached. For the foregoing reasons, the court finds claimant's injuries should be calculated in accordance with K.S.A. 44-510e.[5]

Put simply, the ALJ believed that because the claimant's bilateral *knee* injuries were not listed on the schedule, he was free to award a permanent partial general *body* impairment under K.S.A. 44-510e. He went on to find claimant was entitled to a 32 percent whole body functional impairment[6] and because claimant's wage loss exceeded 10 percent of his preinjury wage, he was also entitled to a 40 percent work disability[7] under K.S.A. 44-510e(a).

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[3] Santner Depo. at 7.

[4] ALJ Award (Feb. 7, 2008) at 3, citing *Casco*, 283 Kan. 508, Syl. Paragraphs 7 and 10.

[5] *Id.* at 3.

[6] This 32 percent impairment opinion was offered by Dr. Huston, the physician appointed to conduct an independent medical examination pursuant to K.S.A. 44-510e(a).

[7] This 40 percent work disability is based upon a 54 percent (actual) wage loss and a 26 percent task loss.

The Board concludes the ALJ's analysis flies in the face of the Supreme Court's analysis in *Casco* and must be modified. In *Casco*, the Kansas Supreme Court considered whether an individual who sustained bilateral, parallel, non-simultaneous injuries to his shoulders was entitled to compensation based upon two separate scheduled injuries, under K.S.A. 44-510d, or as an unscheduled whole body injury, under K.S.A. 44-510e(a). After examining the applicable statutes and the relevant case law, the *Casco* Court departed from the well-recognized and long-established case law going back over 75 years. In doing so, it provided certain rules. They are as follows:

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.
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> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.
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> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with the K.S.A. 44-510d.
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> K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.[8]

Previously, bilateral injuries were considered as being outside the statutory schedule of impairments set forth in K.S.A. 44-510d and were treated as a permanent partial general impairment.[9] Pre-*Casco*, the ALJ's conclusion that claimant was entitled to a whole body award would have been consistent with the law. Now post-*Casco*, the legal analysis must change.

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[8] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

[9] *Honn v. Elliott*, 132 Kan. 454, 295 Pac. 719 (1931).

Apparently, in any combination scheduled injuries are now the rule while nonscheduled injuries are the exception.[10] Based upon language contained within *Casco*, this is true even if an impairment is to a body member that is not identically referenced. [11] And when an employee's injury involves both arms, as here, there is a rebuttable presumption that the claimant is permanently and totally disabled. That presumption can be rebutted by evidence that the claimant is capable of engaging in some type of substantial gainful employment.[12]

Under a process that avoided a *Casco* result, the ALJ employed a rather unique analysis, finding that the claimant's bilateral *knee* injuries were not listed on the schedule of injuries contained in K.S.A. 44-510d. The Board has considered the ALJ's reasoning and finds it to be unpersuasive. In order to accept the ALJ's analysis, one has to accept the underlying assumption that in order for an injury to fall within the schedule set forth in K.S.A. 44-510d, the rating must use the terminology contained within the schedule and ignore the reality that the knee is the connection between the lower leg and the upper leg and, as such, is part of both. While it is true that an injury to the hip is considered a body as a whole injury, that is because of its location within the human skeleton and based upon K.A.R. 51-7-8(c)(4) which considers an injury to the joint on a scheduled member to flow into the next higher scheduled member. The next higher level is the body. Such is not the case with the knee. An injury to the knee structure, i.e. the joint, flows into the entire leg schedule, going from 190 weeks to 200 weeks.

More to the point, this case is analogous to the facts set forth in *Casco*. In both instances, the injury was bilateral, parallel and non-simultaneous. The Board finds that the instant set of facts simply cannot be distinguished from *Casco*. Claimant's injury is, for better or worse, considered to have rendered him presumptively permanently and totally disabled. If that presumption is rebutted, then he is entitled to *two* separately scheduled injuries to his lower extremities at the level of the leg. Unless and until our Supreme Court or the Legislature departs from the *Casco* rationale - the Board finds no other conclusion is justifiable.

Having concluded the ALJ's Award must be modified, the Board now turns to the nature and extent of claimant's impairment. K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

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[10] *Casco*, 283 Kan. 508, Syl. ¶ 7; *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

[11] *Casco*, 283 Kan. at 527 "Because K.S.A. 44-510d is the general rule and an injury to a wrist (forearm) and an ankle (lower leg) are included on the schedule, the *Pruter* court did not have to consider K.S.A. 44-510e, which only applies to injuries not covered by the schedule." With this language the Court acknowledged that wrists and ankles are scheduled injuries in spite of the fact that they are not expressly included in the schedule. A knee is like a wrist and an ankle. It is part and parcel of the member it is attached to.

[12] *Id.*, Syl. ¶ 9.

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

Claimant's injury involves both legs and thus it raises a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2). Unfortunately, because *Casco* is so new, there is no case law which illustrates the extent of evidence necessary to rebut this presumption in a post-*Casco* era. We do know, however, that in those instances where the injury is one that does not involve a combination of body parts (thus no presumption is available) but the claimant nonetheless claims to be permanently and totally disabled, permanent total disability is to be determined in accordance with the facts. And the determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[13]

For example, in *Wardlow*[14] the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently and totally disabled.

Here, claimant is presently working as a part-time security guard, working 31.5 hours per week earning $7.00 an hour. None of the physicians have limited the number of hours claimant can work. It would appear from the evidence that claimant has limited his hours in order to ensure that he maintains his disability status for purposes of his social security disability compensation. Nonetheless, he is able to perform these work duties because he is able to accommodate his need to limit his activities and his sitting position.

Under these facts the Board has no difficulty finding that claimant is not permanently and totally disabled as that term is used. The hourly wage claimant earns is not particularly high but nonetheless, the Board finds that it constitutes substantial gainful employment as that terms is used in the statute, particularly where claimant is self limiting his hours of work. The presumption is, therefore, rebutted and claimant is, under *Casco*, entitled to two separately scheduled functional impairments.

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[13] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[14] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

Claimant argues that his impairments are, based upon the testimony offered by Dr. Delgado, 50 percent to each leg as a result of his "fair" result from his bilateral knee replacements.[15] Dr. Huston's report indicates that claimant has a 15 percent whole body for impairment to the right knee and 20 percent whole body impairment for the left knee.[16] When converted based upon the *Guides,* these ratings yield a 37.5 percent to the right leg and 50 percent to the left. Both physicians utilized the same table from the *Guides* but differed on their conclusions as to claimant's outcome. This accounts for the difference in the percentages for the right leg while the opinions as to the impairment for the left leg are identical.

Claimant presently complains of significant and constant pain and swelling primarily in his left leg. He no longer wears boots and favors moccasins as a means of accommodating his condition. He will vary his positions, either sitting or standing, and elevates both his legs as needed.

The ALJ adopted Dr. Huston's analysis (albeit based upon the whole body impairment figures) finding his opinions to be more persuasive as he was the independent medical examiner. The Board has considered the medical testimony and reports and finds that the ALJ's conclusion should be modified. As to the left lower extremity, both physicians agreed that claimant's impairment was 50 percent. And as for the right lower extremity, the Board finds that claimant's true impairment lies somewhere in between the 37.5 percent assigned by Dr. Huston and the 50 percent assigned by Dr. Delgado. Accordingly, the Award is modified to reflect a 50 percent permanent partial impairment to the left lower extremity and a 43.75 percent permanent partial impairment to the right lower extremity.

The respondent continues to maintain it is entitled to a credit for claimant's preexisting impairment to his right knee. Admittedly, claimant injured his right knee, resulting in an ACL tear which required arthroscopic surgery in 1996. Following his surgery, claimant returned to work without restriction and suffered no further complications or complaints until 2002, when he sustained the accident which gave rise to this claim.

Certainly, when a preexisting condition is aggravated, an injured worker's award shall be reduced by the amount of preexisting functional impairment. K.S.A. 44-501(c) provides:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased

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[15] Both Drs. Delgado and Huston offered impairment ratings based upon the 4th Edition of the *Guides*.

[16] Dr. Huston provided whole body impairment figures and with the aid of Dr. Delgado, these figures were converted to lower extremity ratings so that the two impairment ratings could be compared.

> disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

The Board has interpreted the above statute to require that a ratable functional impairment must preexist the work-related accident. The statute does not require that the functional impairment be rated or that the individual was given formal medical restrictions. But it is critical that the preexisting condition actually constituted an impairment in that it somehow limited the individual's abilities or activities. Here, no physician testified as to what percentage of impairment rating preexisted this injury pursuant to the 4th Edition of the *Guides*. Dr. Huston's apportionment does not satisfy this requirement. Furthermore, an asymptomatic condition that is neither disabling nor ratable under the AMA *Guides*[17] cannot serve as a basis to reduce an award under the above statute.

Claimant argues his award should not be reduced as the only testimony as to his alleged preexisting impairment came from Dr. Huston, who testified that 66 percent of the right leg impairment was attributable to his April 2002 accident, leaving 34 percent of the impairment attributable to his earlier knee surgery. Dr. Huston did not testify and it does not appear from his report that this opinion as to the preexisting impairment was made consistent with the *Guides*. There is no indication that Dr. Huston reviewed contemporaneous medical records and in fact, claimant returned to work without restrictions, performing a job with this respondent that was, by all accounts, rather laborious. Moreover, Dr.Delgado testified that the 1996 injury "had nothing to do with" the 2002 injury.[18]

The ALJ concluded that respondent failed to establish a preexisting impairment and denied respondent's request for a credit under K.S.A. 44-501(c). The Board agrees and affirms that finding.

Finally, claimant argues any temporary total disability benefits that he is entitled to receive should not be deducted when determining his permanent partial disability benefits.[19] The Board has previously considered this argument and disagrees with claimant's position.[20]

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[17] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[18] Delgado Depo. at 7.

[19] The ALJ did not address this issue because he calculated his Award based upon a whole body impairment and thus, the issue of TTD paid was governed by K.S.A. 44-510e(a) which provides a different calculation to account for TTD paid.

[20] *Titus v. USD 229*, No. 1,031,642, 2007 WL 4662016 (Kan. WCAB Dec. 17, 2007).

The schedule of K.S.A. 44-510d provides that a worker is entitled to no more than 200 weeks of permanent disability benefits for the loss of a leg. But that statute does not address how temporary total disability benefits figure into the computation. Indeed, the Act is silent. Consequently, K.A.R. 51-7-8 was adopted and it provides:

> (a)(1) If a worker suffers a loss to a member and, in addition, suffers other injuries contributing to the temporary total disability, compensation for the temporary total disability shall not be deductible from the scheduled amount for those weeks of temporary total disability attributable to the other injuries.
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> (2) The weekly compensation rate for temporary total compensation shall be computed by multiplying .6667 times the worker's gross average weekly wage. This figure shall be subject to the statutory maximum set in K.S.A. 44-510c.
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> (b) If a healing period of 10% of the schedule or partial schedule is granted, not exceeding 15 weeks, it shall be added to the weeks on the schedule or partial schedule before the following computations are made.
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> (1) If a loss of use occurs to a scheduled member of the body, compensation shall be computed as follows:
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> (A) deduct the number of weeks of temporary total compensation from the schedule;
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> (B) multiply the difference by the percent of loss or use to the member; and
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> (C) multiply the result by the applicable weekly temporary total compensation rate.
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> (2) If part of a finger, thumb, or toe is amputated, compensation shall be calculated as follows:
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> (A) multiply the percent of loss, as governed by K.S.A. 1996 Supp. 44-510d, as amended, by the number of weeks on the full schedule for that member;
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> (B) deduct the temporary total compensation; and
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> (C) multiply the remainder by the weekly temporary total compensation rate.
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> (3) If a scheduled member other than a part of a finger, thumb, or toe is amputated, compensation shall be computed by multiplying the number of weeks on the schedule by the worker's weekly temporary total compensation rate. The temporary total compensation previously paid shall be deducted from the total amount allowed for the member.
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> (c)(1) An injury involving the metacarpals shall be considered an injury to the hand. An injury involving the metatarsals shall be considered an injury to the foot.
>
> (2) If the injury results in loss of use of one or more fingers and also a loss of use of the hand, the compensation payable for the injury shall be on the schedule for the hand. Any percentage of permanent partial loss of use of the hand shall be at least sufficient to equal the compensation payable for the injuries to the finger or fingers alone.
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> (3) An injury involving the hip joint shall be computed on the basis of a disability to the body as a whole.
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> (4) An injury at the joint on a scheduled member shall be considered a loss to the next higher schedule.
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> (5) If the tip of a finger, thumb, or toe is amputated, the amputation does not go through the bone, and it is determined that a disability exists, the disability rating shall be based on a computation of a partial loss of use of the entire finger.

> (Authorized by K.S.A. 1996 Supp. 44-510d and K.S.A. 44-573; implementing K.S.A. 1996 Supp. 44-510d; effective Jan. 1, 1966; amended Jan. 1, 1971; amended Jan. 1, 1973; amended, E-74-31, July 1, 1974; amended May 1, 1975; amended Feb. 15, 1977; amended May 1, 1978; amended May 1, 1983; amended, T-88-20, July 1, 1987; amended May 1, 1988; amended May 22, 1998.)

Although the regulation arguably lacks clarity regarding when it applies, it does indicate that the weeks of temporary total disability benefits are to be deducted from the maximum number of weeks provided in the schedule before multiplying by the functional impairment rating to obtain the number of weeks of permanent disability benefits due the injured worker.

There is no question the Director of Workers Compensation may adopt the rules and regulations that are necessary for administering the Workers Compensation Act. The Act provides:

> The director of workers compensation may adopt and promulgate such rules and regulations as the director deems necessary for the purposes of administering and enforcing the provisions of the workers compensation act. . . . All such rules and regulations shall be filed in the office of the secretary of state as provided by article 4 of chapter 77 of the Kansas Statutes Annotated and amendments thereto.[21]

And administrative regulations that are adopted pursuant to statutory authority for the purpose of carrying out the declared legislative policy have the force and effect of law.[22]

> "Rules or regulations of an administrative agency, to be valid, must be within the statutory authority conferred upon the agency. Those rules or regulations that go beyond the authority authorized, which violate the statute, or are inconsistent with the statutory power of the agency have been found void. Administrative rules and regulations to be valid must be appropriate, reasonable and not inconsistent with the law." *Pork Motel, Corp. v. Kansas Dept. of Health & Environment*, 234 Kan. 374, Syl. ¶ 1, 673 P.2d 1126 (1983).[23]

Administrative agencies are generally required to follow their own regulations and failure to do so results in an unlawful action.[24]

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[21] K.S.A. 44-573.

[22] See K.S.A. 77-425; *Harder v. Kansas Comm'n on Civil Rights*, 225 Kan. 556, Syl. ¶ 1, 592 P.2d 456 (1979); *Vandever v. Kansas Dept. of Revenue*, 243 Kan. 693, Syl. ¶ 1, 763 P.2d 317 (1988).

[23] *State v. Pierce*, 246 Kan. 183, 189, 787 P.2d 1189 (1990).

[24] *Vandever v. Kansas Dept. of Revenue*, 243 Kan. 693, Syl. ¶ 2, 763 P.2d 317 (1988).

Consequently, claimant's award of permanent partial disability benefits must be computed after reducing the maximum 200 weeks by the temporary total disability weeks. At oral argument the parties agreed that in the event TTD was to be offset, the TTD paid could merely be split equally between each scheduled injury. Accordingly, 44.845 weeks of TTD will be deducted from the weeks assigned to each injury.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated February 7, 2008, is affirmed in part and modified in part as follows:

RIGHT LEG

The claimant is entitled to 44.85 weeks of temporary total disability compensation at the rate of $318.20 per week in the amount of $14,269.68 followed by 67.88 weeks of permanent partial disability compensation, at the rate of $318.20 per week, in the amount of $21,599.42 for a 43.75 percent loss of use of the right leg, making a total award of $35,869.10.

LEFT LEG

The claimant is entitled to 44.85 weeks of temporary total disability compensation at the rate of $318.20 per week in the amount of $14,269.68 followed by 77.58 weeks of permanent partial disability compensation, at the rate of $318.20 per week, in the amount of $24,685.96 for a 50 percent loss of use of the left leg, making a total award of $38,955.64.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this _____ day of June 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Gary Peterson, Attorney for Claimant
Andrew D. Wimmer, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge